UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v. 16 CV 4511 (KPF)

CHRISTOPHER PLAFORD,

Defendant.

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v. 16 CV 4512 (KPF)

SANJAY VALVANI and GORDON JOHNSTON,

Defendants.

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SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v. 16 CV 4513 (KPF)

STEFAN LUMIERE,

Defendant.

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New York, N.Y.
August 11, 2016

Before:

HON. KATHERINE POLK FAILLA,

District Judge

APPEARANCES

SECURITIES AND EXCHANGE COMMISSION
BY: CHARLES D. RIELY
JASON WILLIAM SUNSHINE

DAVID S. SMITH
Attorney for Defendant Plaford

KRAMER LEVIN NAFTALIS & FRANKEL LLP
Attorneys for Defendant Valvani
BY: JADE ANNE BURNS

CREIZMAN PLLC
Attorneys for Defendant Lumiere
BY: ERIC M. CREIZMAN

PREET BHARARA
United States Attorney for the
Southern District of New York, Intervenor
IAN P. McGINLEY
JOSHUA A. NAFTALIS
DAMIAN WILLIAMS
Assistant United States Attorneys

THE DEPUTY CLERK: In the matter of 16 CV 4511, SEC versus Plaford et al., and 16 CV 4513, SEC versus Lumiere.

Counsel, please identify yourselves for the record.

MR. RIELY: Good morning, your Honor. Charles Riely, with the plaintiff, SEC.

MR. SUNSHINE: Jason Sunshine, with the SEC.

MR. McGINLEY: Good morning, your Honor. Ian McGinley, Damian Williams and Josh Naftalis, for the government.

THE COURT: Mr. McGinley, is one of you taking the laboring oar this morning?

MR. McGINLEY: Yes. I will, your Honor.

THE COURT: Okay. Thank you very much.

MR. CREIZMAN: Good morning, your Honor. Eric Creizman, on behalf of Stefan Lumiere, who's sitting next to me.

THE COURT: Good morning, sir.

And good morning, Mr. Lumiere.

MR. LUMIERE: Good morning.

MS. BURNS: Good morning, your Honor. Jade Burns, from Kramer Levin Naftalis & Frankel, and I'm actually here in the SEC v. Valvani matter -- we were asked to come -- and the docket on that is 16 CIV 4512.

THE COURT: Ms. Burns, we welcome you this morning. It was my understanding that the application to intervene and for a stay was limited to the cases that bookend your case, but am I mistaken? Is your case implicated as well?

MS. BURNS: It is not, your Honor. Mr. Valvani actually passed away on the 20th.

THE COURT: I am aware, yes.

MS. BURNS: We got the notice. We weren't sure whether I should come.

THE COURT: I'm happy to have you. And you represent?

MS. BURNS: I previously represented Mr. Valvani.

THE COURT: Mr. Valvani? You're not here on behalf of Mr. Johnston?

MS. BURNS: No, I am not.

THE COURT: All right. Mr. McGinley, I'm happy to have Ms. Burns here but if you think she's not necessary, I can let her go as well.

MR. McGINLEY: There's no need as far as the government's motion to intervene. We had gotten the message to have all the parties in all three matters here. I believe counsel for Mr. Johnston was excused.

THE COURT: I received a late-breaking application to have counsel for Mr. Johnston excused.

Ms. Burns, you're welcome to stay for a few minutes or go, as you see fit -- I'm going to ask you to stay because after we deal with the government's application, I do want to understand what everyone's intent is. So, let me do that.

Thank you.

MS. BURNS: Thank you.

THE COURT: Sir.

MR. SMITH: Good morning, your Honor. David Smith, on behalf of Christopher Plaford.

THE COURT: Good morning to you.

Mr. McGinley, let me tell you why I didn't just do this on the papers. What was confusing to me -- and maybe it's also confusing other people but maybe it's just me -- is that there are three cases, and normally when I see applications of this type, it's because all three cases are going to be stayed or there's something to that effect, but that's not what I understand to be happening here. You're seeking to intervene just in two of the three cases and not in the other. You're seeking only to stay two of the cases and not the other. I guess I want some understanding of how the efficiencies that are often cited as an argument for allowing the stay component manifest themselves in a situation where one of these cases is going forward.

MR. McGINLEY: Yes, your Honor. I'm happy to address that. And the SEC can obviously jump in if I get anything wrong about the status of their matter.

THE COURT: Yes, sir.

MR. McGINLEY: But my understanding -- just to give your Honor the context, the case that we are not moving to stay is the Johnston/Valvani case.

THE COURT: Yes.

MR. McGINLEY: Mr. Valvani has passed away.

THE COURT: Yes.

MR. McGINLEY: As to Mr. Johnston, he has pled guilty to -- this is public -- to a cooperation agreement with the government.

And Mr. Valvani, for the criminal matters, Mr. Johnston has pled guilty; Mr. Valvani's case has been nolled by the government the criminal matter. My understanding, your Honor, in talking with the SEC, is I believe both of those cases on the civil side, meaning the SEC case versus Johnston -- actually, I know that from talking to the Johnston lawyer -- will be resolving very shortly. I think they are close to a final resolution for your Honor.

THE COURT: And I will hear from Mr. Riely momentarily.

Okay, so because of that, it was the government's view there was no need to intervene in that case?

MR. McGINLEY: Correct. And I think the SEC's case against Valvani will also be resolved shortly.

THE COURT: Maybe that's news to Ms. Burns but, okay, that's fine.

But I guess what was confusing to me is, if the issue divides along whether one is a cooperating witness or cooperating defendant or not, I didn't understand why you were seeking in the Plaford matter to intervene and move to stay in that case but perhaps I've misunderstood. I thought I read in the papers that he too had pleaded guilty pursuant to a cooperation agreement.

MR. McGINLEY: He did, your Honor. And I believe the reason why we did something different in that case and moved to intervene is in that case, my understanding is, they're not as close to a resolution on the civil side and they have been in contact -- I know this from talking to Mr. Smith -- and are working towards resolution. Mr. Plaford has pled guilty in the criminal matter, so this case will resolve itself. The scheme happened over a number of years and it involved mismarking of hundreds of bonds, and so I think the issue in trying to reach a resolution in the civil case right now, my understanding is it boils down to deciding on a few numbers and ways to calculate certain loss.

THE COURT: Perhaps Mr. Naftalis wants to speak?

MR. McGINLEY: It's okay. Thank you.

THE COURT: While you're standing, sir, I do have one other question for you and this is on the section about the stay component and not the intervention component: I understand the argument that a stay is appropriate because to not stay the civil matter would potentially put the defendants in the civil case and in the criminal case into a position of having to decide whether to invoke their Fifth Amendment right against self-incrimination and/or suffer the possibility of an adverse inference in the SEC matter. So, that's the argument I get.

You mentioned it but I actually don't know, and I want to hear from the defendants, whether that is -- it was presented as a hypothetical in your briefing, obviously, because you represent the government you don't represent the defendants. I don't know whether the defendants actually do feel what you've articulated as a concern.

What I find less compelling, even though I know there are courts that have found this, is the notion that I should stay the civil proceedings because to do otherwise would allow greater discovery than one would get under the Federal Rules of Criminal Procedure. I don't know if any of the U.S. Attorney's Office wishes to speak to that, but I have to say, I'm not sure why that's a thing I should be enshrining. What I am mean to say is, if someone is entitled to a quantum of discovery under the civil rules and a smaller quantum of discovery under the criminal rules, if they are, in fact, entitled to that discovery, I'm just not sure why I should be making sure they get less than that to which they are entitled.

So, that has been presented to me as sort of a public policy justification for why I would want to stay the matter, and it's not one that I understand fully. So, I was hoping to hear from anyone who would enlighten me on that one.

MR. McGINLEY: If I may just go first, your Honor, on the government's position?

THE COURT: Sure.

MR. McGINLEY: I think the issue there, the government's concern is that depositions would go forward earlier in the civil case of the cooperating witness, for example, Mr. Plaford --

THE COURT: Right.

MR. McGINLEY: -- and as a result, that gives a defendant in their upcoming criminal matter an early shot at a cooperating witness and could be used by a defendant in the criminal matter later to tailor their defense, where they would get that information much sooner than the 3500 materials.

THE COURT: I appreciate that. I think you may just have hit on an issue that I had not fully fleshed out, which is: I am concerned about what might be considered hiding the ball from a defendant in a criminal or civil case. What you are saying is the obverse of that, which is a concern that giving them the information earlier than 3500 would require might engender a tailoring or shaping of the defense in a way that might not actually be factually accurate.

MR. McGINLEY: I think that is the concern, your Honor. On your point about the universe of discovery, I can just say, as far as the one active case, versus Defendant

Stefan Lumiere, we have produced discovery in that case now to Mr. Creizman. It is extremely voluminous. He has that all now, and so Mr. Lumiere is not in a position of where he has a lack of discovery.

THE COURT: Okay. Thank you very much.

Does anyone else want to speak for the government on either application? No? All right, thank you.

Mr. Riely, may I hear from you, sir. I assume you're not opposing either of these but can I understand, sir, the state of play with respect to the three actions that are before me?

MR. RIELY: Yes, sure, absolutely, your Honor.

As you mentioned, Mr. Johnston put in an application shortly before the conference, informing the Court that we're in settlement negotiations and we hope to have a final resolution by October 31st, which was, I think, the new adjourned date.

With Mr. Valvani, we're in the process of formulating a recommendation to our client, and I think we'll have an answer for the Court in 60 days as to whether that matter will proceed.

THE COURT: Okay.

As to Mr. Plaford, things are happening?

MR. RIELY: Yes, exactly.

THE COURT: Sir, if I were to stay this, things would stop happening; is that correct? Or is it simply that discovery would not be produced? I don't know as a practical matter whether my staying the case actually means the parties stop talking to each other or it just means that discovery does not go forward, depositions don't go forward, there is no initial pretrial conference, but the parties will wait and see what happens with respect to the criminal case before beginning again discussions on the civil case.

MR. RIELY: Yes, I think in the absence of a stay, the parties would be under pressure to get a settlement done before the answer is due, for example. And I think the issues that we are still working out relate to not so much liability but more to the level of disgorgement and civil penalties, and so if we were to determine those issues later, I don't think that that would be inefficient.

THE COURT: Okay. And with respect to -- I kept Ms. Burns here because I wanted to make sure I had a sense of what was happening as that was the case that I was not staying. So that I'm sure I understand what you're saying, you're in discussions with Ms. Burns and something will happen with respect to the civil case as it pertains to Mr. Valvani in the coming weeks and months?

MR. RIELY: Correct.

THE COURT: Okay.

So, my inaction with respect to that case, in the sense of not staying it, is not going to adversely affect the resolution of that case?

MR. RIELY: That's correct.

THE COURT: Do I not need to set up an initial pretrial conference in the case? Is this sufficing as the initial pretrial conference?

MR. RIELY: I think this suffices as the initial pretrial conference and I think there's some ambiguity as to whether an answer even needs to be filed, so I think we'd be willing to stipulate that nothing needs to happen in this case for the next 60 days and we'll provide a report to the Court in 60 days.

THE COURT: Okay.

Ms. Burns, that may be worth the price of admission for you. Does that make sense? I will not have a pretrial conference in this case inasmuch as Mr. Johnston is nearing resolution and your client, or the estate of your client, is working with the SEC to determine what is the proper course of action in that case.

MS. BURNS: Yes, your Honor. That sounds exactly right. And just to be clear, I think the SEC has agreed that there's no answer needed in this case at this time.

THE COURT: I heard that. I am agreeing as well. I'm not going order to there to be an answer. I am going to expect to hear from someone within the next 60 days as to whether the case has been resolved in a manner that doesn't require additional proceedings or whether it would make sense to have the parties in for an initial pretrial conference, at which time we can discuss a response.

MS. BURNS: Thank you, your Honor.

THE COURT: All right. Now you may leave, and thank you very much.

Mr. Creizman, if I may turn to you, sir, what is your position, or your client's position, with respect to both applications from the government?

MR. CREIZMAN: Your Honor, we don't object and the reason why we're not objecting is more of a matter of practicalities than it is the reasons that the government proffered. In our case, we have a firm trial date about six -- less than maybe six months from now. And while we would vigorously defend the SEC case, we are also going to vigorously defend the criminal case. And I think it would be extraordinarily difficult to do that under the circumstances that we're facing now with the criminal case.

There is a voluminous amount of discovery, about two or three terabytes' worth, so I'm going to be very busy over the next several months.

THE COURT: That is understood. Sir, do you have a concern in the civil case about your client's invocation or not of his Fifth Amendment right not to testify, not to be deposed?

MR. CREIZMAN: That's always certainly a concern for any defense lawyer but I don't think that that that's the basis of any objection here from the defense.

THE COURT: Okay. Let me ask the question a little bit differently. As I am exploring the issues and the reasons why I would be granting a stay in a civil case, one of the things that's cited -- in fact, the government cited it here -- was the possibility that your client would have to be put to the Hobson's choice of deciding whether or not to invoke his Fifth Amendment right. I appreciate what you're saying, which is, as a practical matter, the cases are so huge, that they can't be done simultaneously, but I am sort of asking whether another consideration that you have, as opposed to it being sort of a theoretical consideration, is were this case to go forward, your client would have to make that decision.

MR. CREIZMAN: I appreciate the government's concern, of course, for my client's Fifth Amendment rights and that dilemma but, no, that is not a basis for our objection whatsoever.

THE COURT: Or for your lack of objection?

MR. CREIZMAN: Or lack of objection, absolutely. We are not not objecting on those grounds -- we're not objecting to the stay, we're not objecting to the stay based on his Fifth Amendment issue.

THE COURT: Okay.

MR. CREIZMAN: That's not a concern in our situation.

THE COURT: So your client is not worried about the Fifth Amendment issue?

MR. CREIZMAN: No.

THE COURT: Okay. I appreciate that clarification. Thank you.

Mr. Smith, might I hear from you, sir?

MR. SMITH: Yes, your Honor.

THE COURT: In particular, I understand that you are not objecting to the government's application for both intervention and for the stay. Is that correct?

MR. SMITH: That's correct, your Honor.

THE COURT: All right. Could you give me some sense as to why?

MR. SMITH: Well, actually, the Fifth Amendment is a concern for my client.

THE COURT: Okay.

MR. SMITH: At this point, my client has yet to be sentenced and so his Fifth Amendment right still does apply. While we have been working, and hopefully will be working, towards a resolution with the SEC, as the government indicated, there is quite a bit of information that we still need to go through before we can consent to anything or agree upon any numbers, and we have been working to do that. I believe that will continue, your Honor, even with the matter being stayed.

However, issues of restitution, disgorgement, things of that nature, there is an overlap between the criminal case and the civil case, and I think that those issues will be determined at some point clearly by a criminal judgment as well at the end of the criminal case at the time of sentencing, but until that time comes, whether my client testifies or not, what the evidence turns out to be, what his sentencing is, his Fifth Amendment does apply, and I would be advising him to assert the Fifth should he be required to testify at a deposition in the SEC action. And, accordingly, he would face the Hobson's choice of having the adverse inference in that matter, if it's not resolved, versus testifying and potentially compromising his Fifth Amendment.

THE COURT: Sir, you heard Mr. Creizman indicate a concern he has is trying to administer or have your client represented adequately in both cases at the same time can be difficult. Do you have that issue as well?

MR. SMITH: I certainly do, your Honor. There are divergent issues, there are similar issues, there are also separate issues; and while my task is, I think, not going to be nearly as lofty as Mr. Creizman's is preparing for a trial, there are still issues that need to be resolved and dealt with separately. So, I do believe that just the logistics of dealing with both components at the same time will be very difficult as well.

THE COURT: And, sir, do you agree that the government's ability to intervene is one as of right under Rule 24(a)(2)?

MR. SMITH: Yes, your Honor, I believe that, as they have alleged in their papers, I believe they do have that right.

THE COURT: Okay. Anything else you'd like me to know, sir?

MR. SMITH: Nothing, your Honor.

THE COURT: Mr. McGinley, anything else I should know from the government?

MR. McGINLEY: Nothing further from the government.

THE COURT: All right. Thank you very much.

I decided not to bring you all here just merely to put you through paces. I actually really am interested in the issue of staying these proceedings because I am aware of at least two judges in this district, Judge Batts and Judge Rakoff, who have elected in certain cases not to stay the civil side. I believe Judge Rakoff, as he articulated it to me, was of the view that if the Commission were to bring a case concurrently with a prosecution by the United States Attorney's Office, they should be prepared to proceed at the same time. And there is obviously merit in everything that Judge Rakoff says, so I took what he said very seriously and thought about it, and yet on this case, on these facts, I do think it makes sense both to permit the government to intervene as of right and to stay the cases ending in the docket numbers of 4511 and 4513.

With respect to the former, looking at Rule 24(a)(2), the applicant in this case, the government, must file timely, demonstrate an interest in the action, show an impairment of that interest arising from an unfavorable disposition, and have an interest not otherwise protected. All four of those factors are met in this case, given the fact that there is a contemporaneous criminal prosecution at the same time as these civil matters.

With respect to the appropriateness of a stay, there are more factors I must consider. What they include are:

The extent to which the issues in the criminal case overlap with those presented in the civil case. Obviously there's very substantial overlap here;

The status of the case, including whether the defendants have been indicted. That too has been met here;

The private interests of the plaintiffs in proceeding expeditiously weighed against the prejudice to defendants caused by the delay. Here, I don't get the sense that the SEC wishes to proceed in derogation of the government's request for a stay. And in terms of the prejudice to plaintiffs caused by the delay, I don't think there is any because it doesn't sound like this will go on for years and years. I certainly won't let it happen;

As yet another factor, the interests and burdens on the defendants. I should have made that more clear the first time. And in speaking with Mr. Creizman and Mr. Smith, I understand why each of them feels and believes that their client is best served by having the respective civil matter as to that client stayed;

The interests of the courts: From my perspective, I'm happy to do these cases but do I believe there's a certain amount of duplication because my experience has been that oftentimes resolution of the criminal case can expedite resolution of the civil case and so, rather than having them proceed on the same tracks, it may make sense to have mine follow the criminal case;

And then the public interest: I've explored with Mr. McGinley my concerns about the disparity in discovery afforded under the civil and criminal rules but reasons have been given to me that are appropriate as to why this is something I should be concerned about. More than that, each of the counsel for the defendants in the civil cases has explained to me what their concerns are and why their clients are better served with a stay.

So, I will permit the intervention in both cases. I will stay the proceedings in both cases. I will understand in the 4512 case, which I suppose I'll now add to the docket of this because I did hear from counsel for both sides, that I'll be hearing in 60 days from them about what to do, and if that does not work out as the parties currently believe it will, then we'll have everybody in.

Mr. Riely, is there anything else we should be discussing today?

MR. RIELY: No. Thank you, your Honor.

THE COURT: Thank you very much.

Mr. McGinley, anything further?

MR. McGINLEY: Not from the government.

THE COURT: Mr. Creizman, anything else?

MR. CREIZMAN: No, thank you, your Honor.

THE COURT: And Mr. Smith?

MR. SMITH: No, thank you, your Honor.

THE COURT: Thank you, all, for coming in. Thank you.

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